concerning maintenance in Supplement I fits more appropriately in the overall structure of the Enforcement Policy and will provide the appropriate flexibility to deal with the various maintenance issues. Significant deficiencies in the performance of maintenance activities that impact plant equipment where a violation is involved may be considered a significant regulatory concern. The added example provides notice consistent with the final rule that appropriate maintenance is expected to be conducted for both safety-related and applicable balance of plant systems.

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Civil penalty, Enforcement, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Violations, and Waste treatment and disposal.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for part 2 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

* * * * *

2. Appendix C section V.B is amended by removing subsection section V.B.7.

Appendix C supplement I is amended by adding example C.9 after example C.8.

Appendix C—General Statement of Policy and Procedure for NRC Enforcement Actions

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Supplement I—Severity Categories

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Reactor Operations

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C. Severity Level III—Violations involving for example:

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9. Equipment failures caused by inadequate or improper maintenance that substantially complicates recovery from a plant transient.

Dated at Rockville, Maryland this 29th day of July 1991.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 91-18369 Filed 8-1-91; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 211, 231 and 241

[Release Nos. FR-37; 33-6906; 34-29495; File No. S7-5-91]

The Acceptability in Financial Statements of an Accounting Standard Permitting the Return of a Nonaccrual Loan to Accrual Status After a Partial Charge-Off

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission (the "SEC" or "Commission") today announced the publication of an interpretive release setting forth the Commission's view that an accounting standard proposed by the Federal Financial Institutions Examination Council (the "FFIEC" or "Council") for use in bank and thrift regulatory reports would not be acceptable in filings with the Commission. The proposed standard, if adopted, would establish criteria under which a depository institution may selectively return certain nonaccrual loans to accrual status even though full recovery of its contractual principal may not be expected. The Commission's staff has been informed, however, that the FFIEC intends to withdraw the proposal.

EFFECTIVE DATE: July 29, 1991.

FOR FURTHER INFORMATION CONTACT: Robert A. Bayless, Office of the Chief Accountant, Division of Corporation Finance at (202) 272-2553; Douglas N. Barton or Michael D. Foley, Office of the Chief Accountant at (202) 272-2130; Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

On March 14, 1991, the FFIEC issued a request for public comment (the "FFIEC release") on a proposed accounting rule for use in regulatory reporting to banking and thrift regulators.[1] The proposal was in response to requests for clarification of these regulator's guidelines regarding nonaccrual status of loans. The FFIEC release notes that some had questioned whether the book balance remaining after any partial loan charge-off should be returned to accrual status.[2] Accordingly, the FFIEC published for public comment a proposed standard that would permit a nonaccrual loan meeting certain criteria to be returned to accrual status if its recorded amount is reduced by a charge-off to an amount which the lender expects to fully collect based on prudent underwriting standards, including interest at a market rate and a prudent loan-to-value ratio. According to the initial FFIEC release, loans intended to qualify for this accounting method are primarily those which are collateral-dependent, although other loans where the primary source of repayment is a dedicated and readily determinable stream of cash flows may also be eligible. As proposed by the FFIEC, banks and thrifts could elect to use this accounting method, but would not be required to do so. The comment period expired May 2, 1991, and final action on the FFIEC proposal is pending. The Commission's staff has been informed, however, that the FFIEC intends to withdraw the proposal.

On March 13, 1991, the Commission issued a request for public comment concerning whether financial statements of depository institutions applying the accounting method proposed by the FFIEC would be acceptable in filings with the Commission.[3] In that release, the Commission noted that conformance of the proposed method with Generally Accepted Accounting Principles (GAAP) was not clear under existing authoritative literature, and that application of the method selectively to some but not all loans meeting the qualifying criteria may depart from acceptable accounting practice.[4] The Commission received thirty-two letters of comment in response to its request. Commentators included the staff of the Financial Accounting Standards Board (FASB), sixteen financial institutions, five public accounting firms, the American Institute of Certified Public Accountants, the General Accounting Office and various industry, professional and government regulatory organizations.

II. Discussion of Comments

A majority of respondents, including the FASB staff, commented that the proposed method does not conform with

[1] FFIEC, Reporting Standard Concerning the Return of a Loan With a Partial Charge-Off to Accrual Status: Notice of Request for Comment (March 18, 1991) (56 FR 11441).

[2] *Id.*, 56 FR at 11442.

[3] Securities Act Release No. 6886 (March 13, 1991) (56 FR 11465).

[4] Because of the Commission's conclusion concerning the proposal, this release does not discuss certain issues contained in the March 13, 1991 SEC release, such as the appropriate scope of the FFIEC proposal, disclosure requirements, and the preferability of the proposed method. The responses of commentators to these issues, however, are available in File No. S7-5-91 in the Commission's Public Reference Room.

existing GAAP in various respects, although different respondents objected to different aspects of the proposed method. The most frequent objection cited by commentators, including the FASB staff, relates to the requirement that the partial write-down be recorded based on prudent underwriting standards. Commentators believe that this results in recording a loss exceeding that permitted by FASB Statement No. 5.[5]

Additionally, several commentators objected to the proposed use of a market discount rate to measure the partial charge-off as not being consistent with existing literature or practice. Others observed, however, that while not required by existing GAAP, the use of a market discount rate in the measurement of loan impairment may not be precluded.[6]

As proposed by the FFIEC, institutions adopting the proposed method could choose to apply it only to selected loans meeting the criteria specified in the rule, while continuing to use their customary practices for other similar loans. Most commentators who addressed this issue commented that existing GAAP does not permit a reporting entity to apply different accounting methods to similar transactions. The FASB staff indicated this to be their primary area of concern, stating that providing institutions the option to account for similar loans differently would compromise the comparability of financial information and make it more difficult for users to make meaningful comparisons of financial statements.

A significant number of commentators indicated that the proposal would have limited applicability because of existing authoritative literature on in-substance foreclosures.[7] That is, many loans meeting the qualifying criteria proposed by the FFIEC may already have been (or may need to be) accounted for as insubstance foreclosed assets because the expectation that future probable cash flows will be less than the contractual obligation may lead to a conclusion that it is unlikely that the borrower can rebuild equity in the collateral. Hence, the overlap between FFIEC's proposal and existing in-substance foreclosure literature may significantly reduce the population of loans available for the accounting method proposed by FFIEC.

III. Conclusion

In its March 13, 1991 request for comment, the Commission expressed concern about the proposed method's conformance with GAAP, as well as its selective application and other issues. After giving full consideration to the comment letters, the Commission agrees with the views expressed by many of the commentators that the return of a nonaccrual loan to accrual status as proposed in the initial FFIEC release would (i) not be in conformance with GAAP, (ii) raise substantial consistency and comparability issues, and (iii) be of marginal utility due to existing literature regarding in-substance foreclosure accounting. Further, as stated above, the Commission's staff has been informed that the FFIEC intends to withdraw the proposal made in its initial release. Accordingly, the Commission has concluded that the proposed accounting method is not acceptable in filings with the Commission.

List of Subjects in 17 CFR Parts 211, 231 and 241

Accounting, Reporting and recordkeeping requirements, Securities.

PART 211—INTERPRETATIONS RELATING TO FINANCIAL REPORTING MATTERS

PART 231—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER

PART 241—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

Parts 211, 231 and 241 of title 17, chapter II of the Code of Federal Regulations are amended by adding each of the following Release Nos. and the release date of July 29, 1991, to the list of interpretive releases in each part: FR–37, 33–6906 34–29495.

Dated: July 29, 1991.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 91–18331 Filed 8–1–91; 8:45 am]

BILLING CODE 8010–01–M

[5] FASB Statement of Financial Accounting Standards No. 5, Accounting for Contingencies (March 1975), as amended, requires accrual for estimated losses that are "likely to occur" and precludes accrual for losses that are less than likely.

[6] The FASB currently has a project to consider whether and, if so, in what circumstances creditors should measure impairment of loans with collectibility concerns based on the present value of expected future cash flows related to the loan.

[7] See Financial Reporting Release No. 28, Accounting for Loan Losses by Registrants Engaged in Lending Activities, December 1, 1986, and AICPA Practice Bulletin No. 7, Criteria for Determining Whether Collateral for a Loan Has Been In-Substance Foreclosed, April 1990.

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 635

[FHWA Docket No. 90–4]

RIN 2125–AA18

Contract Procedures

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: This final rule prescribes policies, requirements, and procedures relating to Federal-aid highway projects from the time of authorization to proceed to the construction stage, to the time of final acceptance by the FHWA. The regulations are being revised to accommodate several policy changes and to clarify and simplify the regulatory requirements pertaining to the contracting for Federal-aid highway construction.

EFFECTIVE DATE: September 3, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. William A. Weseman, Chief, Construction and Maintenance Division, Office of Engineering, 202–366–0392, or Ms. Michelle Morey, Office of Chief Counsel, 202–366–1374, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION: The existing regulation on contract procedures is being revised to accommodate several policy changes and clarifications issued by Washington Headquarters to the field during the past several years. Also incorporated are several suggested changes from previous Office of the Inspector General (OIG) reviews. The revisions include but are not limited to the following: (a) When a State highway agency (SHA) employs a consultant to provide construction engineering services, a full time employed State engineer no longer needs to be in direct control of the project at all times; (b) highway relocation provisions are no longer included in this subpart as they are addressed in subpart C; (c) additional guidance is provided on analysis of bids; and (d) only contracts terminated for default are subject to a limitation of Federal participation. In addition, the order of presentation of several of the sections has been rearranged to more closely correspond with the orderly process of a Federal-aid project.

An NPRM was published in the Federal Register on June 4, 1990, at 55 FR

22812, in which the FHWA requested comments on the proposed regulations.

Discussion of Comments

General

The comment period to the docket for the NPRM closed on August 3, 1990. The docket received 11 responses from SHA's and 4 from other agencies. In addition to the discussion included below, minor editorial changes and other minor changes to improve clarity have been made. A section-by-section discussion of the comments received and how they were addressed follows:

Section 635.102 Definitions.

Several comments were received by the docket concerning this section. In addressing these comments some minor editorial changes were made as well as definitions added for "force account," "secondary road plan" and "formal approval."

A comment from a SHA recommended that the definition of "specialty items" be modified by inserting the phrase "work items identified in the contract which are not normally associated with highway construction." This change has been made to clarify the definition.

A comment from a trade association indicated concern with the proposed definition for unbalanced bids. It noted that unbalancing a bid means different things to different people and that by attempting to define "mathematically" and "materially" unbalanced bids, too much discretion would be introduced into the bidding process. It is FHWA's position that unbalanced bids had been addressed previously in the regulations but needed further clarification; thus changes were made to include the definitions of "mathematically" and "materially" unbalanced bids. These definitions are based on previous Comptroller General rulings. The FHWA believes that these definitions should be defined in the Code of Federal Regulations. This action does not change the operating procedures of contracting agencies in the application of Federal-aid funds.

Section 635.105 Supervising Agency

The NPRM proposed that when a SHA employs a consultant to provide construction engineering services, rather than having a full-time State employed engineer "in responsible charge and direct control of the project at all times," as had been required, the full-time State employed engineer need only be "in responsible charge of the project." Three SHA's and one trade association commented on this item. In response to these comments, an editorial change was made to clarify that the full-time, State-employed engineer is to be a full-time State employee (not part-time) who is at the jobsite for the time needed to insure that the project receives adequate supervision and inspection to insure that work is accomplished in conformance with approved plans and specifications.

Section 635.106 Use of Publicly Owned Equipment

One comment was received from a SHA expressing disagreement with the concept that contractors can use publicly owned equipment. This comment was considered; however, realizing that it must be shown to be cost effective before publicly owned equipment can be used, no change was made to this section.

Section 635.108 Health and Safety

One comment was received from a trade association indicating its support of the requirement that "the contractor shall provide all safeguards, safety devices, and protective equipment and shall take any such actions reasonably necessary to protect the life and health of persons working at the site of the project and the safety of the public and to protect property in connection with the performance of the work covered by the contract." It recommended that the regulation be revised to stipulate that States may use unit pricing for safety equipment. In response, the FHWA believes that it is unnecessary to address payment methods for safety items. The manner in which this protection is paid for is best left to the SHA's to decide.

Section 635.109 Standardized Changed Condition Clauses

Comments on this section were received from a trade association and from a SHA. The trade association indicated that the term "excluding loss of anticipated profits" was unclear in that it appeared to be a double negative and could mean that anticipated profit would be included under a change in a contract. The trade association believes that anticipated profit should be reimbursable. It is the FHWA's position that Federal-aid funds may not be applied to anticipated profit. To improve clarity, the phrase "loss of anticipated profit" has been changed to "anticipated profit."

The trade association also indicated concern with respect to paragraph (a)(1)(iv). The proposed regulation provides that "no contract adjustment will be allowed under this clause for any effects caused on unchanged work." It was the commenter's position that it would be better if the adjustment would compensate the contractor for all cost increases caused by the changed condition, including the effects caused on unchanged work (i.e., impact costs). It was also recommended with respect to paragraph (a)(3)(B), that it should be stipulated that: (1) If there is an increase in the amount of quantities of up to 125 percent, the contractor should get paid whether or not a change order has been issued and (2) that the 125 percent be changed to 115 percent. The SHA indicated opposition to the required Standardized Contract clauses because "it breaches the autonomy of a State's contract procedures."

Regarding impact costs, as discussed in the preamble of the final rule implementing this regulation (54 FR 4269, January 30, 1989 Docket No. 87–15), it remains the FHWA's position with respect to paragraph (a)(1), that impact costs may be provided for at the option of the SHA. Concerning the comment on the 125 percent threshold, the threshold of 125 percent has not been changed. The 125 percent was contained in the previous regulation. It is felt to be reasonable and fair and has been used in the 1988 AASHTO Guide Specification for Highway Construction (§ 14.02(c)).

Section 635.110 Licensing and Qualification of Contractors

One comment was received from a trade association indicating that it felt the language was too broadly written and should not include the addition of "bonding and insurance." It believes that States should have the right to consider and require bonding and insurance as a prudent course to insure that the public interest is being well served in today's competitive construction market.

Bonding and insurance have been specifically listed to emphasize that no preaward criteria should operate to restrict competition or to prevent submission or consideration of a bid. The FHWA agrees with the trade association that States have the right to consider and require bonding and insurance if they believe that the public interest is well served by such action; however, bonding and insurance criteria which may restrict competition shall not be permitted.

Section 635.111 Tied Bids

Because of general dissatisfaction with the proposed term "linked," the existing term "tied" has been retained. Three comments were received on this section from SHA's. Clarification was requested concerning who may make

the decision regarding the tying of bids. To clarify this section, FHWA has revised the first sentence of paragraph (a) to clearly indicate that Federal-aid projects or Federal-aid projects and State-financed projects may be tied together by the SHA or the SHA may permit the bidders to submit tied bids when the State has determined that by so doing more favorable bids may be received.

In addition, it was recommended that the wording "lowest overall responsive and responsible bidders' bid" be included as States may have reason to reject the lowest overall bid in order to comply with requirements for responsiveness and responsibility. In response, the FHWA has revised the last sentence of § 636.111 (b) to include the word "responsive" in describing the low bid proposal on which Federal participation shall be based. Also, a sentence has been added to clarify the action to be taken if an unsupported shift of cost liability to the Federal-aid work occurs.

Section 635.112 Advertising for Bids

No comments were received concerning this section; however, FHWA has amended this section in order to improve clarity by changing reference to "advertised specifications and subsequent contracts" and "bid proposal package" to "bidding documents".

Section 635.113 Bid Opening and Bid Tabulation

In the Notice of Proposed Rulemaking (NPRM), the FHWA proposed to require States to submit an engineer's estimate with the bid tabulation. The FHWA has now decided to not make this change because all States are currently voluntarily submitting the engineer's estimate with the bid tabulation without such a requirement.

In response to the proposed requirement, one SHA indicated that by State statute they are exempt from releasing the engineer's estimate under the State's freedom of information regulations. They routinely provide the engineer's estimate to the FHWA Division Administrator; however, they request that FHWA take whatever action is necessary to ensure the security of this information. The FHWA maintains that engineer's estimates are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, provided the State considers the engineer's estimate confidential and the estimate has not been released to the public.

In support of the proposed rule, another SHA indicated that they do not object to including an engineer's estimate with the tabulation of bids nor do they object to not allowing negotiation after bidding and prior to award.

Another SHA commented that negotiations with contractors be permitted when there are errors in the bid so long as the negotiations do not change the total bid amount or when only one bid is received. It has a State law which allows negotiation with a bidder on a one-bid project when the bid amount exceeds the engineer's estimate. It has been and continues to be the FHWA's policy that, based on 23 U.S.C. 112, negotiations prior to award of a contract is inconsistent with the competitive bidding principle.

Section 635.114 Award of Contract and Concurrence in Award

Four comments were received on this proposed section from two SHA's, one trade association and one public transportation agency. One comment recommended that award procedures for FHWA funded projects should be as consistent as possible with those of UMTA funded projects. The FHWA requires that it concur prior to award of contracts while UMTA allows certified grantees to make such awards up to $1 million without prior concurrence. The FHWA's procedures for award are consistent with the provisions of title 23, U.S.C., and to make the change proposed would violate current statutes.

One SHA commented that FHWA concurrence should not be required for a State to reject all bids. To permit a SHA to reject all bids without FHWA concurrence would not be consistent with the agency's contract letting policy. This policy, based on the requirement of title 23, U.S.C., assures that Federal-aid contracts are awarded to responsible bidders submitting the lowest responsive bids. The suggested change was not made.

Another SHA commented that it should be acceptable to make minor corrections to a bid after receipt of bids, without jeopardizing the integrity of the bidding process. The FHWA agrees that there may be some minor bidding requirements which could be corrected after receipt of bids, without jeopardizing the integrity of the bidding process. This section addresses the requirement that the SHA must identify in the bidding documents those items which must be complied with to make a bid responsive. Therefore, no changes have been made to this section.

One comment recommended that in paragraph (d), the language "if the SHA's specifications permit" should be deleted, ending the sentence after the word "awarded." The FHWA agreed with this comment and has made the recommended change.

In addition, FHWA has amended this section to improve clarity, by moving paragraph (g) to § 635.112 (h), in that this paragraph is more applicable at the time of advertising for bids.

Section 635.116 Subcontracting

One comment was received from a SHA indicating that the requirements of paragraph (c) were misplaced and recommended that they be included in a separate section. The requirements of paragraph (c) are related to subcontracting; however, a change in the section title to "Subcontracting and contractor responsibilities" has been made in that it better indicates what is included in this section.

Section 635.117 Labor and Employment

For clarification, a cross reference to the applicable Affirmative Action regulations (23 CFR part 230, 41 CFR part 60 and Exec. Order No. 11246 (Sept. 24, 1965), 3 CFR 339 (1964–1965), as amended) has been added.

Section 635.120 Changes and Extra Work

Four comments were received, three from SHA's and one from a trade association. One SHA commenter indicated that there were circumstances which may dictate an exception to approval of changes in contract time at the same time as approval of the extra work. In addition, it believes that this is not a regulatory issue, but rather a matter of construction policy, and that the regulations should remain unchanged in this area.

The FHWA believes that it is sound construction practice to submit changes in contract time at the same time as the respective work change; however, it does recognize that exceptions do occur. For some change orders, the interrelationship between work items is such that it is difficult to realistically indicate the actual change in the time to complete the project concurrent with the work order approval. The FHWA agrees with these comments and has changed the wording from requiring these time changes at the same time as the work change to that of indicating that time changes "should" be submitted at the same time. However, the times when concurrent approval cannot take place should be for only unusual circumstances.

One SHA indicated concern about paragraph (e) in the NPRM which required States to perform and

document an independent cost analysis of each negotiated extra work order. It felt that making such an independent cost analysis would be a repetitive effort. Another SHA indicated that the term "independent" needed clarification. The word "independent" as included in the NPRM has been deleted. The paragraph now indicates that a cost analysis is needed for each negotiated contract change or negotiated extra work order, i.e., documentation is needed to cover the basis of the change, any special conditions and the basis of payment including supporting documentation as applicable.

Another commenter took exception to the proposed NPRM requirement that for contract changes and extra work orders the reason or reasons for the use of "force account" would be subject to the approval of FHWA. The commenter felt this change in procedure could cause very expensive delays for only a minimal benefit. In response to this comment, paragraph (d) has been revised to clarify that the reason or reasons for using force account procedures shall be documented. Such documentation should be available for review by the FHWA at the time of change order or extra work approval.

The trade association indicated that it fully supports the new paragraph (d) under this section which states that "force account procedures shall only be used when strictly necessary." The FHWA believes this change will reduce the amount of force account work by encouraging the SHA's to negotiate prices with the contractors.

Section 635.121 Contract Time and Contract Time Extensions

Two comments were received from SHA's. One SHA indicated no objections to the proposed revision requiring written procedures for determination of contract time.

The other SHA opposed the provision requiring SHA's to have "adequate written procedures" for determining contract time. It also expressed concern about the application of such procedures on a uniform statewide basis. In addition, the SHA recommended that implementation of this requirement be modified to accommodate ongoing studies because this SHA is currently engaged in a major research project to study a rational process for determining work days by project type and other parameters.

The FHWA believes that SHA's need to have adequate "written procedures" as a basis of good contracting practice and to ensure that the public interest is protected. In addressing the application of such procedures on a uniform statewide basis, FHWA agrees that conditions throughout a State may vary; therefore, the requirement for having "written procedures for the determination of contract time on a uniform statewide basis" has been revised to read "written procedures for the determination of contract time." In this manner differences throughout the State can be accounted for in the State's procedure. Further, the FHWA agrees that the requirement should be modified to accommodate ongoing studies. Therefore, the FHWA has provided the SHA's with a 6-month period after the final rule is effective to phase in this requirement. This phase in period will also permit the SHA's to adequately document their time determination procedures.

Section 635.122 Participation in Progress Payments

Two comments were received from SHA's. Both recommended that paragraph (a)(3) be revised to indicate that the contractor should furnish an invoice or delivery receipt only if requested by the SHA. No change has been made. The FHWA believes that it is a prudent contract administration practice to receive an invoice or delivery receipt when paying for stockpiled materials.

Section 635.124 Participation in Contract Claim Awards and Settlements

One comment was received from a trade association. It recommended that the FHWA not foreclose the possibility of participation in a contract claim award where State law contemplates award of, among other things, anticipated profit.

The FHWA reviews each claim on a case-by-case basis; however, it is FHWA's policy to not participate in anticipated profit. In addition, unlike major changes in work, which require prior approval, the extent of Federal participation in a claim will normally be determined after the work has been completed and a thorough review of the pertinent factors and all supporting documentation has taken place.

In section (d), the current language states, "In those cases where the SHA receives an adverse decision in an amount more than can be justified by the SHA, the FHWA will participate up to the appropriate matching share * * *" Because at times it is more prudent for a SHA to settle a claim than to litigate it, language has been added to this section to address FHWA participation in claim settlements, where the amount involved is more than the SHA can support.

In Paragraph (e), the current language of "acts not consistent within the standards of the profession" is difficult for FHWA to administer because no written or easily ascertainable "standards of the profession" exist that can be applied nationwide. To provide the FHWA with a means of ascertaining acceptable standards of practice for a particular State, as determined on a case-by-case basis, the current language has been changed to "acts not consistent with usual State practices."

Some minor changes have been made to this section to improve clarity and to strengthen the State/FHWA partnership philosophy of the Federal-aid highway program.

Section 635.125 Termination of Contract

No comments were received concerning this section; however, FHWA has amended this section to clarify existing FHWA policy and procedure relative to the termination of construction contracts. The amendment emphasizes the need for states to obtain the prior concurrence of the Division Administrator in the terms of a termination to assure Federal participation in costs involved. Concurrence must be based on the practical and economical completion factors involved in each particular situation. As indicated in existing § 635.125(e), the FHWA objective of limiting total costs in contract termination to the amount which was authorized under the initial approval of plans, specifications and estimates (and normal amendments for change orders) unless unusual justification for increased amounts can be made. The increased amounts should not include costs incurred as a result of gross errors or neglect in contract administration by the State.

Section 635.126 Record of Materials, Supplies, and Labor

Two comments were received from SHA's. One questioned the accuracy of data supplied by the contractors without a viable means for the State to verify the accuracy of such data. The other requested that paragraphs (b)(2) and (b)(3) be rewritten to clarify that only the information to be shown on Form FHWA-47, and not the data which supports that information, be submitted to the SHA.

In response, a requirement has been added that the SHA review the Form FHWA-47 for reasonableness. It is expected that a State employee sufficiently familiar with the project will perform this review. It is not intended

that an audit of contractor records be undertaken. In addition, editorial changes have been made to clarify that only the completed Form FHWA-47 be submitted to the SHA and to clarify when the requirements of this section are applicable.

Rulemaking Analysis and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document does not contain a major rule under Executive Order 12291, or a significant regulation under the regulatory policies and procedures of the Department of Transportation. It is anticipated that the regulatory impact of this rulemaking, if any, will be minimal since the amendments revise existing FHWA regulations on contract procedures and delineate acceptable procedures that are consistent with Federal statutes, and 49 CFR part 18.

The revised regulations would impose mandatory standards on State and local governments that we believe are necessary to meet requirements in Federal statutes and provide general procedural direction and recommended criteria. In its entirety, however, the regulation is less prescriptive and allows greater flexibility in administering Federal-aid projects under the authority of title 23, United States Code. Therefore, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354), the agency has evaluated the effects of this rule on small entities. It is anticipated that this rule will have a minimal economic impact. Hence, the FHWA certifies that this rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612. It has been determined that this document has federalism implications. However, we believe that the Federalism implications are mitigated by the need to meet requirements mandated by statute, and the agency has allowed the maximum administrative discretion to meet the intent of the statute. Therefore, a federalism assessment has not been prepared.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

This rule does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulatory Identification Number

A regulatory identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 635

Government contracts, Grant programs—transportation, Highways and roads.

In consideration of the foregoing, the FHWA hereby amends part 635, subpart A of chapter I of title 23, Code of Federal Regulations, as set forth below.

Issued on: July 26, 1991.

T.D. Larson,

Administrator.

PART 635—CONSTRUCTION AND MAINTENANCE

1. The authority citation for part 635 continues to read as follows:

Authority: 23 U.S.C. 112, 113, 114, 117, 128, and 315; 31 U.S.C. 6506; 42 U.S.C. 3334, 4601, *et seq.*; 49 CFR 1.48(b).

2. Subpart A (consisting of §§ 635.101–635.126) of part 635 is revised to read as follows:

Subpart A—Contract Procedures

Sec.

Subpart A—Contract Procedures

§ 635.101 Purpose.

To prescribe policies, requirements, and procedures relating to Federal-aid highway projects, from the time of authorization to proceed to the construction stage, to the time of final acceptance by the Federal Highway Administration (FHWA).

§ 635.102 Definitions.

As used in this subpart:

Administrator means Federal Highway Administrator.

Certification Acceptance means the alternative procedure which may be used for administering certain highway projects involving Federal funds pursuant to 23 U.S.C. 117.

Division Administrator means the chief FHWA official assigned to conduct business in a particular State. A State is as defined in 23 U.S.C. 101.

Force account means a basis of payment for the direct performance of highway construction work with payment based on the actual cost of labor, equipment, and materials furnished and consideration for overhead and profit.

Formal approval means approval in writing or the electronic transmission of such approval.

Local public agency means any city, county, township, municipality, or other political subdivision that may be empowered to cooperate with the State highway agency in highway matters.

Major change or major extra work means a change which will significantly affect the cost of the project to the Federal Government or alter the termini, character or scope of work.

Materially unbalanced bid means a bid which generates a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the Government.

Mathematically unbalanced bid means a bid containing lump sum or unit bid items which do not reflect reasonable actual costs plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other indirect costs.

Public agency means any organization with administrative or functional responsibilities which are directly or indirectly affiliated with a governmental body of any nation, State, or local jurisdiction.

Publicly owned equipment means equipment previously purchased or otherwise acquired by the public agency involved primarily for use in its own operations.

Secondary Road Plan means the alternative procedure which may be used for the administration of Federal-aid projects on the Federal-aid secondary system pursuant to 23 U.S.C. 117.

Specialty items means work items identified in the contract which are not normally associated with highway construction and require highly specialized knowledge, abilities or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid on the contract; in general these items are to be limited to minor components of the overall contract.

State highway agency (SHA) means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction. The term "State" should be considered equivalent to "State highway agency" if the context so implies.

§ 635.103 Applicability.

The policies, requirements, and procedures prescribed in this subpart shall apply to all Federal-aid highway projects except for those title 23 requirements specifically discharged in an approved certification acceptance plan or secondary road plan, in accordance with 23 U.S.C. 117.

§ 635.104 Method of construction.

(a) Actual construction work shall be performed by contract awarded by competitive bidding; unless, as provided in § 635.104(b), the SHA demonstrates to the satisfaction of the Division Administrator that some other method is more cost effective or that an emergency exists. The SHA shall assure opportunity for free, open, and competitive bidding, including adequate publicity of the advertisements or calls for bids. The advertising or calling for bids and the award of contracts shall comply with the procedures and requirements set forth in §§ 635.112 and 635.114.

(b) Approval by the Division Administrator for construction by a method other than competitive bidding shall be requested by the State in accordance with subpart B of part 635 of this chapter. Before such finding is made, the SHA shall determine that the organization to undertake the work is so staffed and equipped as to perform such work satisfactorily and cost effectively.

§ 635.105 Supervising agency.

(a) The SHA has responsibility for the construction of all Federal-aid projects, and is not relieved of such responsibility by authorizing performance of the work by a local public agency or other Federal agency. The SHA shall be responsible for insuring that such projects receive adequate supervision and inspection to insure that projects are completed in conformance with approved plans and specifications.

(b) Although the SHA may employ a consultant to provide construction engineering services, such as inspection or survey work on a project, the SHA shall provide a full-time employed State engineer to be in responsible charge of the project.

(c) When a project is located on a street or highway over which the SHA does not have legal jurisdiction, or when special conditions warrant, the SHA, while not relieved of overall project responsibility, may arrange for the local public agency having jurisdiction over such street or highway to perform the work with its own forces or by contract; provided the following conditions are met and the Division Administrator approves the arrangements in advance.

(1) In the case of force account work, there is full compliance with subpart B of this part.

(2) When the work is to be performed under a contract awarded by a local public agency, all Federal requirements including those prescribed in this subpart shall be met.

(3) The local public agency is adequately staffed and suitably equipped to undertake and satisfactorily complete the work; and

(4) In those instances where a local public agency elects to use consultants for construction engineering services, the local public agency shall provide a full-time employee of the agency to be in responsible charge of the project.

§ 635.106 Use of publicly owned equipment.

(a) Publicly owned equipment should not normally compete with privately owned equipment on a project to be let to contract. There may be exceptional cases, however, in which the use of equipment of the State or local public agency for highway construction purposes may be warranted or justified. A proposal by any SHA for the use of publicly owned equipment on such a project must be supported by a showing that it would clearly be cost effective to do so under the conditions peculiar to the individual project or locality.

(b) Where publicly owned equipment is to be made available in connection with construction work to be let to contract, Federal funds may participate in the cost of such work provided the following conditions are met:

(1) The proposed use of such equipment is clearly set forth in the Plans, Specifications and Estimate (PS&E) submitted to the Division Administrator for approval.

(2) The advertised specifications specify the items of publicly owned equipment available for use by the successful bidder, the rates to be charged, and the points of availability or delivery of the equipment; and

(3) The advertised specifications include a notification that the successful bidder has the option either of renting part or all of such equipment from the State or local public agency or otherwise providing the equipment necessary for the performance of the contract work.

(c) In the rental of publicly owned equipment to contractors, the State or local public agency shall not profit at the expense of Federal funds.

(d) Unforeseeable conditions may make it necessary to provide publicly owned equipment to the contractor at rental rates agreed to between the contractor and the State or local public agency after the work has started. Any such arrangement shall not form the basis for any increase in the cost of the project on which Federal funds are to participate.

(e) When publicly owned equipment is used on projects constructed on a force account basis, costs may be determined by agreed unit prices or on an actual cost basis. When agreed unit prices are applied the equipment need not be itemized nor rental rates shown in the estimate. However, if such work is to be performed on an actual cost basis, the

SHA shall submit to the Division Administrator for approval the schedule of rates proposed to be charged, exclusive of profit, for the publicly owned equipment made available for use.

§ 635.107 Small and disadvantaged business participation.

The SHA shall schedule contract lettings in a balanced program providing contracts of such size and character as to assure an opportunity for all sizes of contracting organizations to compete. In accordance with title VI of the Civil Rights Act of 1964, subsequent Federal-aid Highway Acts, and 49 CFR part 23, the SHA shall affirmatively encourage disadvantaged business enterprise participation in the highway construction program.

§ 635.108 Health and safety.

Contracts for projects shall include provisions designed:

(a) To insure full compliance with all applicable Federal, State, and local laws governing safety, health and sanitation; and

(b) To require that the contractor shall provide all safeguards, safety devices, and protective equipment and shall take any other actions reasonably necessary to protect the life and health of persons working at the site of the project and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

§ 635.109 Standardized changed condition clauses.

(a) Except as provided in paragraph (b) of this section, the following changed conditions contract clauses shall be made part of, and incorporated in, each highway construction project approved under 23 U.S.C. 106:

(1) Differing site conditions.

(i) During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the site is disturbed and before the affected work is performed.

(ii) Upon written notification, the engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding anticipated profits, will be made and the contract modified in writing accordingly. The engineer will notify the contractor of the determination whether or not an adjustment of the contract is warranted.

(iii) No contract adjustment which results in a benefit to the contractor will be allowed unless the contractor has provided the required written notice.

(iv) No contract adjustment will be allowed under this clause for any effects caused on unchanged work. (This provision may be omitted by the SHA's at their option.)

(2) Suspensions of work ordered by the engineer.

(i) If the performance of all or any portion of the work is suspended or delayed by the engineer in writing for an unreasonable period of time (not originally anticipated, customary, or inherent to the construction industry) and the contractor believes that additional compensation and/or contract time is due as a result of such suspension or delay, the contractor shall submit to the engineer in writing a request for adjustment within 7 calendar days of receipt of the notice to resume work. The request shall set forth the reasons and support for such adjustment.

(ii) Upon receipt, the engineer will evaluate the contractor's request. If the engineer agrees that the cost and/or time required for the performance of the contract has increased as a result of such suspension and the suspension was caused by conditions beyond the control of and not the fault of the contractor, its suppliers, or subcontractors at any approved tier, and not caused by weather, the engineer will make an adjustment (excluding profit) and modify the contract in writing accordingly. The contractor will be notified of the engineer's determination whether or not an adjustment of the contract is warranted.

(iii) No contract adjustment will be allowed unless the contractor has submitted the request for adjustment within the time prescribed.

(iv) No contract adjustment will be allowed under this clause to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided or excluded under any other term or condition of this contract.

(3) Significant changes in the character of work.

(i) The engineer reserves the right to make, in writing, at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project.

Such changes in quantities and alterations shall not invalidate the contract nor release the surety, and the contractor agrees to perform the work as altered.

(ii) If the alterations or changes in quantities significantly change the character of the work under the contract, whether such alterations or changes are in themselves significant changes to the character of the work or by affecting other work cause such other work to become significantly different in character, an adjustment, excluding anticipated profit, will be made to the contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the contractor in such amount as the engineer may determine to be fair and equitable.

(iii) If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract.

(iv) The term "significant change" shall be construed to apply only to the following circumstances:

(A) When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or

(B) When a major item of work, as defined elsewhere in the contract, is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of original contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.

(b) The provisions of this section shall be governed by the following:

(1) Where State statute does not permit one or more of the contract clauses included in paragraph (a) of this section, the State statute shall prevail and such clause or clauses need not be made applicable to Federal-aid highway contracts.

(2) Where the State highway agency has developed and implemented one or more of the contract clauses included in paragraph (a) of this section, such clause or clauses, as developed by the State highway agency may be included in Federal-aid highway contracts in lieu of the corresponding clause or clauses in

paragraph (a) of this section. The State's action must be pursuant to a specific State statute requiring differing contract conditions clauses. Such State developed clause or clauses, however, must be in conformance with 23 U.S.C., 23 CFR and other applicable Federal statutes and regulations as appropriate and shall be subject to the Division Administrator's approval as part of the PS&E.

§ 635.110 Licensing and qualification of contractors.

(a) The procedures and requirements a SHA proposes to use for qualifying and licensing contractors, who may bid for, be awarded, or perform Federal-aid highway contracts, shall be submitted to the Division Administrator for advance approval. Only those procedures and requirements so approved shall be effective with respect to Federal-aid highway projects. Any changes in approved procedures and requirements shall likewise be subject to approval by the Division Administrator.

(b) No procedure or requirement for bonding, insurance, prequalification, qualification, or licensing of contractors shall be approved which, in the judgment of the Division Administrator, may operate to restrict competition, to prevent submission of a bid by, or to prohibit the consideration of a bid submitted by, any responsible contractor, whether resident or nonresident of the State wherein the work is to be performed.

(c) No contractor shall be required by law, regulation, or practice to obtain a license before submission of a bid or before the bid may be considered for award of a contract. This, however, is not intended to preclude requirements for the licensing of a contractor upon or subsequent to the award of the contract if such requirements are consistent with competitive bidding. Prequalification of contractors may be required as a condition for submission of a bid or award of contract only if the period between the date of issuing a call for bids and the date of opening of bids affords sufficient time to enable a bidder to obtain the required prequalification rating.

(d) Requirements for the prequalification, qualification or licensing of contractors, that operate to govern the amount of work that may be bid upon by, or may be awarded to, a contractor, shall be approved only if based upon a full and appropriate evaluation of the contractor's capability to perform the work.

(e) Contractors who are currently suspended, debarred or voluntarily excluded under 49 CFR part 29 or otherwise determined to be ineligible, shall be prohibited from participating in the Federal-aid highway program.

§ 635.111 Tied bids.

(a) The SHA may tie or permit the tying of Federal-aid highway projects or Federal-aid and State-financed highway projects for bidding purposes where it appears that by so doing more favorable bids may be received. To avoid discrimination against contractors desiring to bid upon a lesser amount of work than that included in the tied combinations, provisions should be made to permit bidding separately on the individual projects whenever they are of such character as to be suitable for bidding independently.

(b) When Federal-aid and State-financed highway projects are tied or permitted to be tied together for bidding purposes, the bid schedule shall set forth the quantities separately for the Federal-aid work and the State-financed work. All proposals submitted for the tied projects must contain separate bid prices for each project individually. Federal participation in the cost of the work shall be on the basis of the lowest overall responsive bid proposal unless the analysis of bids reveals that mathematical unbalancing has caused an unsupported shift of cost liability to the Federal-aid work. If such a finding is made, Federal participation shall be based on the unit prices represented in the proposal by the individual contractor who would be the lowest responsive and responsible bidder if only the Federal-aid project were considered.

(c) Federal-aid highway projects and State-financed highway projects may be combined in one contract if the conditions of the projects are so similar that the unit costs on the Federal-aid projects should not be increased by such combinations of projects. In such cases, like quantities should be combined in the proposal to avoid the possibility of unbalancing of bids in favor of either of the projects in the combination.

§ 635.112 Advertising for bids.

(a) No work shall be undertaken on any Federal-aid project, nor shall any project be advertised for bids, prior to authorization by the Division Administrator.

(b) The advertisement and approved plans and specifications shall be available to bidders a minimum of 3 weeks prior to opening of bids except that shorter periods may be approved by the Division Administrator in special cases when justified.

(c) The SHA shall obtain the approval of the Division Administrator prior to issuing any addenda which contain a major change to the approved plans or specifications during the advertising period. Minor addenda need not receive prior approval but should be identified by the SHA at the time of or prior to requesting FHWA concurrence in award. The SHA shall provide assurance that all bidders have received all issued addenda.

(d) Nondiscriminatory bidding procedures shall be afforded to all qualified bidders regardless of National, State or local boundaries and without regard to race, color, religion, sex, national origin, age, or handicap. If any provisions of State laws, specifications, regulations, or policies may operate in any manner contrary to Federal requirements, including title VI of the Civil Rights Act of 1964, to prevent submission of a bid, or prohibit consideration of a bid submitted by any responsible bidder appropriately qualified in accordance with § 635.110, such provisions shall not be applicable to Federal-aid projects. Where such nonapplicable provisions exist, notices of advertising, specifications, special provisions or other governing documents shall include a positive statement to advise prospective bidders of those provisions that are not applicable.

(e) No public agency shall be permitted to bid in competition or to enter into subcontracts with private contractors.

(f) The SHA shall include a noncollusion provision substantially as follows in the bidding documents:

> Each bidder shall file a statement executed by, or on behalf of the person, firm, association, or corporation submitting the bid certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action, in restraint of free competitive bidding in connection with the submitted bid. Failure to submit the executed statement as part of the bidding documents will make the bid nonresponsive and not eligible for award consideration.

(1) The required form for the statement will be provided by the State to each prospective bidder.

(2) The statement shall either be in the form of an affidavit executed and sworn to by the bidder before a person who is authorized by the laws of the State to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(g) The SHA shall include the lobbying certification requirement pursuant to 49 CFR part 20 and the requirements of 49 CFR part 29

regarding suspension and debarment certification in the bidding documents.

(h) The SHA shall clearly identify in the bidding documents those requirements which the bidder must assure are complied with to make the bid responsive. Failure to comply with these identified bidding requirements shall make the bid nonresponsive and not eligible for award consideration.

§ 635.113 Bid opening and bid tabulations.

(a) All bids received in accordance with the terms of the advertisement shall be publicly opened and announced either item by item or by total amount. If any bid received is not read aloud, the name of the bidder and the reason for not reading the bid aloud shall be publicly announced at the letting. Negotiation with contractors, during the period following the opening of bids and before the award of the contract shall not be permitted.

(b) The SHA shall prepare and forward tabulations of bids to the Division Administrator. These tabulations shall be certified by a responsible SHA official and shall show:

(1) Bid item details for at least the low three acceptable bids and

(2) The total amounts of all other acceptable bids.

§ 635.114 Award of contract and concurrence in award.

(a) Federal-aid contracts shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting the criteria of responsibility as may have been established by the SHA in accordance with § 635.110. Award shall be within the time established by the SHA and subject to the prior concurrence of the Division Administrator.

(b) The SHA shall formally request concurrence by the Division Administrator in the award of all Federal-aid contracts. Concurrence in award by the Division Administrator is a prerequisite to Federal participation in construction costs and is considered as authority to proceed with construction, unless specifically stated otherwise. Concurrence in award shall be formally approved and shall only be given after receipt and review of the tabulation of bids.

(c) Following the opening of bids, the SHA shall examine the unit bid prices of the apparent low bid for reasonable conformance with the engineer's estimated prices. A bid with extreme variations from the engineer's estimate, or where obvious unbalancing of unit prices has occurred, shall be thoroughly evaluated.

(d) Where obvious unbalanced bid items exist, the SHA's decision to award or reject a bid shall be supported by written justification. A bid found to be mathematically unbalanced, but not found to be materially unbalanced, may be awarded.

(e) When a low bid is determined to be both mathematically and materially unbalanced, the Division Administrator will take appropriate steps to protect the Federal interest. This action may be concurrence in a SHA decision not to award the contract. If, however, the SHA decides to proceed with the award and requests FHWA concurrence, the Division Administrator's action may range from nonconcurrence to concurrence with contingency conditions limiting Federal participation.

(f) If the SHA determines that the lowest bid is not responsive or the bidder is not responsible, it shall so notify and obtain the Division Administrator's concurrence before making an award to the next lowest bidder.

(g) If the SHA rejects or declines to read or consider a low bid on the grounds that it is not responsive because of noncompliance with a requirement which was not clearly identified in the bidding documents, it shall submit justification for its action. If such justification is not considered by the Division Administrator to be sufficient, concurrence will not be given to award to another bidder on the contract at the same letting.

(h) Any proposal by the SHA to reject all bids received for a Federal-aid contract shall be submitted to the Division Administrator for concurrence, accompanied by adequate justification.

(i) In the event the low bidder selected by the SHA for contract award forfeits the bid guarantee, the SHA may dispose of the amounts of such forfeited guarantees in accordance with its normal practices.

(j) A copy of the executed contract between the SHA and the construction contractor should be furnished to the Division Administrator as soon as practicable after execution.

§ 635.115 Agreement estimate.

(a) Following the award of contract, an agreement estimate based on the contract unit prices and estimated quantities shall be prepared by the SHA and submitted to the Division Administrator as soon as practicable for use in the preparation of the project agreement. The agreement estimate shall also include the actual or best estimated costs of any other items to be included in the project agreement.

(b) An agreement estimate shall be submitted by the SHA for each force account project (see 23 CFR part 635, subpart B) when the plans and specifications are submitted to the Division Administrator for approval. It shall normally be based on the estimated quantities and the unit prices agreed upon in advance between the SHA and the Division Administrator, whether the work is to be done by the SHA or by a local public agency. Such agreed unit prices shall constitute a commitment as the basis for Federal participation in the cost of the project. The unit prices shall be based upon the estimated actual cost of performing the work but shall in no case exceed unit prices currently being obtained by competitive bidding on comparable highway construction work in the same general locality. In special cases involving unusual circumstances, the estimate may be based upon the estimated costs for labor, materials, equipment rentals, and supervision to complete the work rather than upon agreed unit prices. This paragraph shall not be applicable to agreement estimates for railroad and utility force account work.

§ 635.116 Subcontracting and contractor responsibilities.

(a) Contracts for projects shall specify the minimum percentage of work that a contractor must perform with its own organization. This percentage shall be not less than 30 percent of the total original contract price excluding any identified specialty items. Specialty items may be performed by subcontract and the amount of any such specialty items so performed may be deducted from the total original contract before computing the amount of work required to be performed by the contractor's own organization. The contract amount upon which the above requirement is computed includes the cost of materials and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

(b) The SHA shall not permit any of the contract work to be performed under a subcontract, unless such arrangement has been authorized by the SHA in writing. Prior to authorizing a subcontract, the SHA shall assure that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract. The Division Administrator may permit the SHA to satisfy the subcontract assurance requirements by concurrence in a SHA process which requires the contractor to certify that each subcontract

arrangement will be in the form of a written agreement containing all the requirements and pertinent provisions of the prime contract. Prior to the Division Administrator's concurrence, the SHA must demonstrate that it has an acceptable plan for monitoring such certifications.

(c) To assure that all work (including subcontract work) is performed in accordance with the contract requirements, the contractor shall be required to furnish:

(1) A competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work), and;

(2) Such other of its own organizational resources (supervision, management, and engineering services) as the SHA contracting officer determines are necessary to assure the performance of the contract.

§ 635.117 Labor and employment.

(a) No construction work shall be performed by convict labor at the work site or within the limits of any Federal-aid highway construction project from the time of award of the contract or the start of work on force account until final acceptance of the work by the SHA unless it is labor performed by convicts who are on parole, supervised release, or probation.

(b) No procedures or requirement shall be imposed by any State which will operate to discriminate against the employment of labor from any other State, possession or territory of the United States, in the construction of a Federal-aid project.

(c) The selection of labor to be employed by the contractor on any Federal-aid project shall be by the contractor without regard to race, color, religion, sex, national origin, age, or handicap and in accordance with 23 CFR part 230, 41 CFR part 60 and Exec. Order No. 11246 (Sept. 24, 1965), 3 CFR 339 (1964–1965), as amended.

(d) Pursuant to 23 U.S.C. 140(d), it is permissible for SHA's to implement procedures or requirements which will extend preferential employment to Indians living on or near a reservation on eligible projects as defined in paragraph (e) of this section. Indian preference shall be applied without regard to tribal affiliation or place of enrollment. In no instance should a contractor be compelled to layoff or terminate a permanent core-crew employee to meet a preference goal.

(e) Projects eligible for Indian employment preference consideration are projects located on roads within or providing access to an Indian reservation or other Indian lands as defined under the term "Indian Reservation Roads" in 23 U.S.C. 101 and regulations issued thereunder. The terminus of a road "providing access to" is that point at which it intersects with a road functionally classified as a collector or higher classification (outside the reservation boundary) in both urban and rural areas. In the case of an Interstate highway, the terminus is the first interchange outside the reservation.

(f) The advertisement or call for bids on any contract for the construction of a project located on the Federal-aid system either shall include the minimum wage rates determined by the Secretary of Labor to be prevailing on the same type of work on similar construction in the immediate locality or shall provide that such rates are set out in the bidding documents and shall further specify that such rates are a part of the contract covering the project.

§ 635.118 Payroll and weekly statements.

For all projects, copies of payrolls and statements of wages paid, filed with the State as set forth in the required contract provisions for the project, are to be retained by the SHA for the time period pursuant to 49 CFR part 18 for review as needed by the Federal Highway Administration, the Department of Labor, the General Accounting Office, or other agencies.

§ 635.119 False statements.

The following notice shall be posted on each Federal-aid highway project in one or more places where it is readily available to and viewable by all personnel concerned with the project:

Notice to All Personnel Engaged on Federal-Aid Highway Projects

United States Code, title 18, section 1020, reads as follows:

Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the costs thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction of any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever, knowingly makes any false statement, false representation, false report, or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever, knowingly makes any false statement or false representation as to a material fact in any statement, certificate, or report submitted pursuant to the provisions of the Federal-aid Road Act approved July 11, 1916 (39 Stat. 355), as amended and supplemented,

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 635.120 Changes and extra work.

(a) Following authorization to proceed with a project, all major changes in the plans and contract provisions and all major extra work shall have formal approval by the Division Administrator in advance of their effective dates. However, when emergency or unusual conditions justify, the Division Administrator may give tentative advance approval orally to such changes or extra work and ratify such approval with formal approval as soon thereafter as practicable.

(b) For non-major changes and non-major extra work, formal approval is necessary but such approval may be given retroactively at the discretion of the Division Administrator. The SHA should establish and document with the Division Administrator's concurrence specific parameters as to what constitutes a non-major change and non-major extra work.

(c) Changes in contract time, as related to contract changes or extra work, should be submitted at the same time as the respective work change for approval by the Division Administrator.

(d) In establishing the method of payment for contract changes or extra work orders, force account procedures shall only be used when strictly necessary, such as when agreement cannot be reached with the contractor on the price of a new work item, or when the extent of work is unknown or is of such character that a price cannot be determined to a reasonable degree of accuracy. The reason or reasons for using force account procedures shall be documented.

(e) The SHA shall perform and adequately document a cost analysis of each negotiated contract change or negotiated extra work order. The method and degree of the cost analysis shall be subject to the approval of the Division Administrator.

(f) Proposed changes and extra work involved in nonparticipating operations that may affect the design or participating construction features of a project, shall be subject to review and

concurrence by the Division Administrator.

§ 635.121 Contract time and contract time extensions.

(a) The SHA should have adequate written procedures for the determination of contract time. These procedures should be submitted for approval to the Division Administrator within 6 months of the effective date of this Final Rule.

(b) Contract time extensions granted by a SHA shall be subject to the concurrence of the Division Administrator and will be considered in determining the amount of Federal participation. Contract time extensions submitted for approval to the Division Administrator, shall be fully justified and adequately documented.

§ 635.122 Participation in progress payments.

(a) Federal funds will participate in the costs to the SHA of construction accomplished as the work progresses, based on a request for reimbursement submitted by State highway agencies. When the contract provisions provide for payment for stockpiled materials, the amount of the reimbursement request upon which participation is based may include the appropriate value of approved specification materials delivered by the contractor at the project site or at another designated location in the vicinity of such construction, provided that:

(1) The material conforms with the requirements of the plans and specifications.

(2) The material is supported by a paid invoice or a receipt for delivery of materials. If supported by a receipt of delivery of materials, the contractor must furnish the paid invoice within a reasonable time after receiving payment from the SHA; and

(3) The quantity of a stockpiled material eligible for Federal participation in any case shall not exceed the total estimated quantity required to complete the project. The value of the stockpiled material shall not exceed the appropriate portion of the value of the contract item or items in which such materials are to be incorporated.

(b) The materials may be stockpiled by the contractor at a location not in the vicinity of the project, if the SHA determines that because of required fabrication at an off-site location, it is not feasible or practicable to stockpile the materials in the vicinity of the project.

§ 635.123 Determination and documentation of pay quantities.

(a) The SHA shall have procedures in effect which will provide adequate assurance that the quantities of completed work are determined accurately and on a uniform basis throughout the State. All such determinations and all related source documents upon which payment is based shall be made a matter of record.

(b) Initial source documents pertaining to the determination of pay quantities are among those records and documents which must be retained pursuant to 49 CFR part 18.

§ 635.124 Participation in contract claim awards and settlements.

(a) The eligibility for and extent of Federal-aid participation up to the Federal statutory share in a contract claim award made by a State to a Federal-aid contractor on the basis of an arbitration or mediation proceeding, administrative board determination, court judgment, negotiated settlement, or other contract claim settlement shall be determined on a case-by-case basis. Federal funds will participate to the extent that any contract adjustments made are supported, and have a basis in terms of the contract and applicable State law, as fairly construed. Further, the basis for the adjustment and contractor compensation shall be in accord with prevailing principles of public contract law.

(b) The FHWA shall be made aware by the SHA of the details of the claim at an early stage so that coordination of efforts can be satisfactorily accomplished. It is expected that SHA's will diligently pursue the satisfactory resolution of claims within a reasonable period of time. Claims arising on projects handled under Certification Acceptance or Secondary Road Plan procedures should be processed in accordance with the State's approved Plan.

(c) When requesting Federal participation, the SHA shall set forth in writing the legal and contractual basis for the claim, together with the cost data and other facts supporting the award or settlement. Federal-aid participation in such instances shall be supported by a SHA audit of the actual costs incurred by the contractor unless waived by the FHWA as unwarranted. Where difficult, complex, or novel legal issues appear in the claim, such that evaluation of legal controversies is critical to consideration of the award or settlement, the SHA shall include in its submission a legal opinion from its counsel setting forth the basis for determining the extent of the liability under local law, with a level of detail commensurate with the magnitude and complexity of the issues involved.

(d) In those cases where the SHA receives an adverse decision in an amount more than the SHA was able to support prior to the decision or settles a claim in an amount more than the SHA can support, the FHWA will participate up to the appropriate Federal matching share, to the extent that it involves a Federal-aid participating portion of the contract, provided that:

(1) The FHWA was consulted and concurred in the proposed course of action;

(2) All appropriate courses of action had been considered; and

(3) The SHA pursued the case diligently and in a professional manner.

(e) Federal funds will not participate:

(1) If it has been determined that SHA employees, officers, or agents acted with gross negligence, or participated in intentional acts or omissions, fraud, or other acts not consistent with usual State practices in project design, plan preparation, contract administration, or other activities which gave rise to the claim;

(2) In such cost items as consequential or punitive damages, anticipated profit, or any award or payment of attorney's fees paid by a State to an opposing party in litigation; and

(3) In tort, inverse condemnation, or other claims erroneously styled as claims "under a contract."

(f) Payment of interest associated with a claim will be eligible for participation provided that the payment to the contractor for interest is allowable by State statute or specification and the costs are not a result of delays caused by dilatory action of the State or the contractor. The interest rates must not exceed the rate provided for by the State statute or specification.

(g) In cases where SHA's affirmatively recover compensatory damages through contract claims, cross-claims, or counter claims from contractors, subcontractors, or their agents on projects on which there was Federal-aid participation, the Federal share of such recovery shall be equivalent to the Federal share of the project or projects involved. Such recovery shall be credited to the project or projects from which the claim or claims arose.

§ 635.125 Termination of contract.

(a) All contracts exceeding $10,000 shall contain suitable provisions for termination by the State, including the manner by which the termination will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract

may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(b) The SHA prior to termination of a Federal-aid contract shall consult with and receive the concurrence of the Division Administrator. The extent of Federal-aid participation in contract termination costs, including final settlement, will depend upon the merits of the individual case. However, under no circumstances shall Federal funds participate in anticipated profit on work not performed.

(c) Except as provided for in paragraph (e) of this section, normal Federal-aid plans, specifications, and estimates, advertising, and award procedures are to be followed when a SHA awards the contract for completion of a terminated Federal-aid contract.

(d) When a SHA awards the contract for completion of a Federal-aid contract previously terminated for default, the construction amount eligible for Federal participation on the project should not exceed whichever amount is the lesser, either:

(1) The amount representing the payments made under the original contract plus payments made under the new contract; or

(2) The amount representing what the cost would have been if the construction had been completed as contemplated by the plans and specifications under the original contract.

(e) If the surety awards a contract for completion of a defaulted Federal-aid contract or completes it by some other acceptable means, the FHWA will consider the terms of the original contract to be in effect and that the work will be completed in accordance with the approved plans and specifications included therein. No further FHWA approval or concurrence action will therefore be needed in connection with any defaulted Federal-aid contract awarded by a surety. Under this procedure, the construction amount eligible for Federal participation on the project should not exceed the amount representing what the cost would have been if the construction had been completed as contemplated by the plans and specifications under the original contract.

§ 635.126 Record of materials, supplies, and labor.

(a) The provisions in this section are required to facilitate FHWA's efforts to compile data on Federal-aid contracts for the establishment of highway construction usage factors.

(b) On all Federal-aid construction contracts, except Federal-aid secondary and off-system projects, those which provide solely for the installation of protective devices at railroad crossings, those which are constructed on a force account or direct labor basis, highway beautification contracts, and contracts for which the total final construction cost for roadway and bridge is less than $1,000,000 the SHA shall require the contractor:

(1) To become familiar with the list of specific materials and supplies including labor-hour and gross earning items contained in Form FHWA–47, "Statement of Materials and Labor Used by Contractors on Highway Construction Involving Federal Funds," prior to the commencement of work under this contract;

(2) To maintain a record of the total cost of all materials and supplies purchased for and incorporated in the work, and also of the quantities of those specific materials and supplies listed on Form FHWA–47, and in the units shown; and

(3) To furnish, upon the completion of the contract, to the SHA on Form FHWA–47 both the data required in paragraph (b)(2) of this section relative to materials and supplies and a final labor summary for all contract work indicating the total hours worked and the gross earnings.

(c) Upon receipt from the contractor, the SHA shall review the Form FHWA–47 for reasonableness and promptly transmit the form to the Division Administrator in accordance with the instructions printed in the form.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 913

Illinois Permanent Regulatory Program; Permit Issuance

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is announcing the approval of a proposed amendment to the Illinois permanent regulatory program (hereinafter referred to as the Illinois program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment modifies the permit issuance requirements at § 1773.19 in title 62 of the Illinois Administrative Code (IAC) and at section 2.11(d) of the Illinois Surface Coal Mining Land Conservation and Reclamation Act (State Act). The amendment makes the requirements of the Illinois program no less effective than the Federal program.

EFFECTIVE DATE: August 2, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Fulton, Director, Springfield Field Office, Office of Surface Mining Reclamation and Enforcement, 511 West Capitol Avenue, suite 202, Springfield, Illinois 62704, Telephone: (217) 492–4495.

SUPPLEMENTARY INFORMATION:

I. Background on the Illinois Program

On June 1, 1982, the Secretary of the Interior conditionally approved the Illinois program. Information pertinent to the general background of the Illinois program submission, as well as the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval can be found in the June 1, 1982 **Federal Register** (47 FR 23883). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 913.10, 913.15, 913.16, and 913.17.

II. Submission of Amendments

On August 29, 1990, the Illinois General Assembly amended section 2.11(d) of the State Act to make the issuance of coal mine permits in Illinois consistent with the Federal counterpart provisions of section 514(c) of SMCRA. This amendment of the State Act requires that the Illinois regulatory program also be amended. In response to the statutory change and to make the requirements of the Illinois program no less effective than the Federal program, Illinois by letter dated March 5, 1991 (Administrative Record No. IL–1144) submitted proposed changes to its permit issuance regulations at 62 IAC 1773.19.

OSM announced receipt of the proposed amendments in the April 1, 1991 **Federal Register** (56 FR 13300) and in the same notice, opened the public comment period and provided opportunity for a public hearing on the adequacy of the proposed amendment. The comment period closed on May 1, 1991.

Because proposed changes to the State Act were inadvertently omitted from the April 1, 1991 **Federal Register**